

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TERESA L. SELING,) CASE NO. C13-0809-JLR-MAT
Plaintiff,)
v.)
CAROLYN W. COLVIN, Acting) REPORT AND RECOMMENDATION
Commissioner of Social Security,) RE: SOCIAL SECURITY DISABILITY
Defendant.) APPEAL
)
)

Plaintiff Teresa L. Seling proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1963.¹ She completed college and previously worked as a library and book salesperson, real estate agent, and sales representative. (AR 182, 202, 224.)

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case
Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 Plaintiff filed an application for DIB on June 29, 2010, alleging disability since
 02 September 27, 2006. (AR 139-40.) Her application was denied initially and on
 03 reconsideration, and she timely requested a hearing. ALJ Kimberly Boyce held a hearing on
 04 February 15, 2012, taking testimony from plaintiff and a vocational expert. (AR 27-62.) At
 05 hearing, plaintiff amended her application, asking for a closed period of disability from
 06 September 27, 2006 through August 1, 2011. (AR 30-31.) On March 2, 2012, the ALJ
 07 rendered a decision finding plaintiff not disabled. (AR 10-20.)

08 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
 09 on March 4, 2013 (AR 1-5), making the ALJ's decision the final decision of the Commissioner.
 10 Plaintiff appealed this final decision of the Commissioner to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
 15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
 16 must be determined whether the claimant is gainfully employed. The ALJ found that, while
 17 plaintiff worked after the alleged disability onset date, the work activity did not rise to the level
 18 of substantial gainful activity. At step two, it must be determined whether a claimant suffers
 19 from a severe impairment. The ALJ found plaintiff's lumbar spine disorder, with multiple disc
 20 protrusions and multilevel degenerative changes, severe. Step three asks whether a claimant's
 21 impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments did not
 22 meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform medium work as defined in 20 C.F.R. § 404.1567(c), except that she could stand and/or walk a total of six hours in an eight-hour workday, and could sit for a total of four hours in an eight-hour workday, with normal breaks. The ALJ further found plaintiff could frequently kneel, crouch, and crawl, could occasionally stoop, and should avoid concentrated exposure to hazards because of the effect of pain medication. With that RFC, and with the assistance of a vocational expert, the ALJ found plaintiff able to perform her past relevant work as a library and book salesperson, real estate agent, and sales representative.

If a claimant demonstrates an inability to perform past relevant work or has no past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With consideration of the Medical-Vocational Guidelines and the testimony of the vocational expert, the ALJ alternatively found jobs existed in significant numbers in the national economy plaintiff could perform, such as janitor, cleaner/maid, and assembler. The ALJ, therefore, concluded plaintiff was not under a disability during the closed period of disability – from September 27, 2006 through August 1, 2011.

This Court's review of the final decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in assessing her credibility. She requests remand for payment of benefits or, in the alternative, for further proceedings. The Commissioner maintains the ALJ's decision has the support of substantial evidence and should be affirmed. For the reasons set forth below, the Court agrees with the Commissioner.

Credibility

Absent evidence of malingerering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). See also *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). “General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “In weighing a claimant’s credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

21 In this case, the ALJ found that, while plaintiff's medically determinable impairments
22 could reasonably be expected to cause the alleged symptoms, plaintiff's statements concerning

01 the intensity, persistence, and limiting effects of those symptoms were not credible. (AR
 02 16-18.)² Contrary to plaintiff's contention, the ALJ provided clear and convincing reasons for
 03 her conclusion.

04 A. Activities and Self-Employment

05 The ALJ reasoned that plaintiff's reported activities and self-employment subsequent to
 06 her September 2006 injury in a car accident indicated she was able to return to gainful activity
 07 prior to her alleged closed period date of August 1, 2011. She noted evidence that plaintiff had
 08 "delayed possible medical care in order to travel[,"] and "reported moving boxes without pain."
 09 (AR 16 (citing AR 374, 385).) The ALJ further stated:

10 In late 2009, the claimant began breeding cats, an endeavor that required caring
 11 for her animals, advertising her stock, building a website, and conducting all
 12 sales activity. In a function report from July 2010, the claimant reported skiing,
 13 walking, and caring for pets, driving, sweeping and vacuuming, preparing large
 14 meals, and having no difficulties with her personal care. She also declared that
 15 she could sit for two hours at a time, and could walk ten city blocks before
 needing to rest ([AR 190-201]). At the hearing, the claimant reported that she
 began skiing in late 2008 as a form of physical rehabilitation, and that she
 performed this activity on a limited, beginner-level basis, with the benefit of
 pain medication. This level of activity is inconsistent with a finding that the
 claimant was disable[d] during her alleged period of disability.

16 (AR 17.)

17
 18 2 The ALJ elaborated on this finding in her conclusion. (AR 18 ("I acknowledge that the
 19 claimant suffered a severe accident, and subsequently experienced a dramatic financial reversal. As a
 20 formerly athletic and active person, she appears to have had an understandably difficult time accepting
 21 the physical limitations caused by her pain. However, the claimant's reported activities and limited
 22 medical treatment, as well as the objective medical evidence, indicate that she was not disabled under
 the applicable standard of being unable to return to gainful activity. Despite my finding that she is not
 disabled under this standard, I certainly recognize the validity of her feelings of loss. I do not discredit
 her pain, only her allegation that she could not return to some form of gainful activity within the alleged
 period of disability.")) As the Commissioner observes, this discussion is consistent with the ALJ's
 earlier statement that plaintiff's statements regarding the intensity, persistence, and limiting effects of
 her symptoms were not credible.

01 Plaintiff first asserts that a single treatment note reflecting travel did not translate to an
 02 ability to perform substantial gainful activity on a regular and substantial basis. *See Orn v.*
 03 *Astrue*, 495 F.3d 625, 638-39 (9th Cir. 2007) (“ . . . [D]aily activities may be grounds for an
 04 adverse credibility finding ‘if a claimant is able to spend a substantial part of his day engaged in
 05 pursuits involving the performance of physical functions that are transferable to a work
 06 setting.’”) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)), and *Hostrawser v.*
 07 *Astrue*, No. 08-17474, 2010 U.S. App. LEXIS 2594 at *378 (9th Cir. Feb. 5, 2010) (fact that
 08 claimant occasionally traveled and performed activities such as shopping, doing chores, and
 09 using a computer did not “equate to being able to undertake the physical functions that would
 10 be required on a sustained basis”).

11 However, there are “two grounds for using daily activities to form the basis of an
 12 adverse credibility determination[,]” including (1) whether the activities contradict the
 13 claimant’s testimony and (2) whether the activities “meet the threshold for transferable work
 14 skills[.]” *Orn*, 495 F.3d at 639 (citing *Fair*, 885 F.2d at 603). The ALJ here appropriately
 15 considered the record reflecting plaintiff’s delayed treatment in order to travel as one of several
 16 different examples of activity inconsistent with plaintiff’s testimony as to the degree of her
 17 limitation.

18 Plaintiff next observes that, in pointing to the report that she moved boxes without pain,
 19 the ALJ omitted to mention that the same treatment note reflected she developed a flare of back
 20 pain two to three days later while walking her dog, resulting in severe pain and about three days
 21 resting in bed. (AR 374.) She avers that the ALJ erred in “not fully accounting for the
 22 context of materials or all parts of the testimony and reports.” *Reddick v. Chater*, 157 F.3d

01 715, 722-23 (9th Cir. 1998); *see also Gallant v. Heckler*, 753 F.2d 1450, 1455-56 (9th Cir.
 02 1984) (ALJ “cannot reach a conclusion first, and then attempt to justify it by ignoring
 03 competent evidence in the record that suggests an opposite result.”)

04 Again, however, plaintiff fails to demonstrate error. “Where the evidence is
 05 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be
 06 upheld.” *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) (citing
 07 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)). The treatment note in question
 08 reflects that plaintiff engaged in a significant physical activity without difficulty, and only
 09 several days later developed pain while engaging in a different physical activity – walking her
 10 dog. It can be said that the ALJ rationally took note of plaintiff’s report that she was able to
 11 move boxes without pain as an additional example of evidence inconsistent with her testimony.
 12 *See Orn*, 495 F.3d at 639.

13 Plaintiff next argues the ALJ drew an unreasonable inference based on her activities
 14 associated with breeding cats. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)
 15 (“The ALJ’s findings will be upheld ‘if supported by inferences reasonably drawn from the
 16 record’”) (quoting *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.
 17 2004)). She describes her testimony as to this activity (*see AR 35-39*), and denies any
 18 evidence she spent a substantial portion of her day engaging in work activities or that her
 19 activities would transfer to a competitive work setting on a full-time basis given her need to lie
 20 down during the day (*see AR 51-52*).

21 However, plaintiff fails to demonstrate the ALJ’s interpretation of the evidence of her
 22 activities as related to her cat breeding business was not rational. The ALJ appropriately

01 considered plaintiff's ability to engage in some work activity. *See generally Drouin v.*
 02 *Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992) ("She was able to hold two previous jobs with a
 03 fair amount of success, and even if those particular jobs are, as she claims, too taxing for her,
 04 the vocational counselor testified that she is qualified for thousands of less strenuous jobs.")
 05 The ALJ further appropriately considered the tasks involved in that work activity – including
 06 caring for her animals, advertising her stock, building a website, and conducting all sales
 07 activity – as additional evidence contradicting plaintiff's testimony. The inferences drawn
 08 were reasonable.

09 Plaintiff also takes issue with the ALJ's reliance on evidence of her skiing. She notes
 10 her explanation at hearing as to the limited nature of that activity (*see* AR 38-40), and denies
 11 she spent a substantial portion of her day skiing or that this activity would transfer to a
 12 competitive work setting. The ALJ's consideration of this evidence was, however, entirely
 13 appropriate as evidence of a level of activity contradicting plaintiff's testimony. The ALJ
 14 acknowledged plaintiff's explanation as to this activity at hearing, but reasonably concluded the
 15 level of activity was inconsistent with a finding of disability. *See Tonapetyan v. Halter*, 242
 16 F.3d 1144, 1148 (9th Cir. 2001) (ALJ appropriately considers inconsistency with the evidence).
 17 Indeed, the mere fact that plaintiff's skiing was limited to "three or four" or "4-5 runs" at a time,
 18 on four or five occasions, "just for a couple of hours[,] does not undercut the ALJ's
 19 consideration of this evidence. (AR 38-40, 195, 199.)

20 Finally, plaintiff challenges the ALJ's reliance on evidence of her daily activities,
 21 asserting they were taken out of context in that a number of activities were performed while
 22 lying down, only to a limited extent, and/or spread out over the course of the day. (*See* AR

01 190-95, 200.) She points to the Ninth Circuit's recognition that a claimant need not be
 02 "utterly incapacitated" in order to be disabled." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
 03 Cir. 2001) (quoting *Fair*, 885 F.2d at 603).

04 Plaintiff fails to demonstrate error. As also recognized by the Ninth Circuit: "Even
 05 where [a claimant's] activities suggest some difficulty functioning, they may be grounds for
 06 discrediting the claimant's testimony to the extent that they contradict claims of a totally
 07 debilitating impairment." *Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9th Cir. 2012) (citations
 08 omitted). Here, the ALJ considered plaintiff's acknowledgment of and references to her
 09 participation in a variety of activities contradicting her allegations, including activities
 10 reflecting substantial physical activity that could not be performed while lying down, such as
 11 skiing, walking, caring for pets, driving, sweeping, and vacuuming. Although not referenced
 12 by the ALJ, plaintiff also noted in her function report that she engaged in biking "for 20-30
 13 minutes at a time." (AR 199.) See *Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1005 n.3 (9th
 14 Cir. 2006) (observations did not constitute an improper post hoc rationalization given that they
 15 were offered not "to invent a new ground of decision[,] but to provide "additional support for
 16 the Commissioner's and the ALJ's position.") The ALJ's consideration of this evidence of
 17 plaintiff's activities was rational and should be upheld.

18 Plaintiff, in sum, fails to demonstrate error in the ALJ's consideration of her reported
 19 activities and self-employment in finding her less than fully credible. These considerations
 20 serve as clear and convincing reasons supporting the ALJ's decision.

21 B. Medical Record

22 The ALJ also considered the fact that the "medical record documents minimal treatment

01 necessary for [plaintiff's] injury, as well as generally intact functioning." (AR 17.) She
02 described a significant number of relevant medical records and concluded:

03 The claimant's pattern of treatment indicates that her back pain was intermittent
04 and improved by steroid injections and chiropractic treatment. Overall, her
05 limited medical treatment is inconsistent with her allegation of disabling pain
06 and dysfunction. Furthermore, her repeated findings of a normal gait, full
07 lumbar range of motion, negative straight leg raises, and full lower extremity
08 strength are inconsistent with her alleged limitations.

09 (AR 17-18.)

10 In challenging the ALJ's reasoning, plaintiff provides her own description of the
11 medical record. (See Dkt. 15 at 9-12.) She maintains that, taken as a whole, the evidence
12 supports her allegation that, while her symptoms gradually improved during the relevant
13 period, she remained symptomatic through August 2011. She avers that the evidence does not
14 contradict her testimony that she needed to lie down during the day. (AR 52.) Plaintiff also
15 asserts that the ALJ failed to consider that her treatment was limited by her lack of insurance,
16 noting her testimony to that effect. (AR 51.) *See Social Security Ruling (SSR) 96-7p* (ALJ
17 should not draw inferences from failure to seek or pursue treatment without first considering
18 explanations for that failure, including an inability to afford treatment). She further notes that,
19 even if the ALJ accurately characterized the evidence, an ALJ may not discredit testimony as to
20 subjective symptoms based solely on an absence of support by objective evidence. *Lester*, 81
F.3d at 834. However, as discussed below, plaintiff fails to demonstrate error in the ALJ's
consideration of the medical evidence as related to her credibility.

21 "While subjective pain testimony cannot be rejected on the sole ground that it is not
22 fully corroborated by objective medical evidence, the medical evidence is still a relevant factor

01 in determining the severity of the claimant's pain and its disabling effects." *Rollins v.*
 02 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 96-7p. Indeed, credibility determinations
 03 are inescapably linked to conclusions regarding medical evidence. *See* 20 C.F.R. § 404.1529.
 04 In this case, the ALJ did not expressly reason that she rejected plaintiff's testimony based on an
 05 absence of corroboration by objective medical evidence. She, at most, pointed to findings
 06 reflecting, for example, moderate and mild objective findings. (AR 17.) In any event, even if
 07 construed as relying on an absence of corroborating objective evidence, this reasoning would
 08 not be inappropriate given that the ALJ provided other clear and convincing reasons for finding
 09 plaintiff less than fully credible.

10 The ALJ did, on other hand, directly point to contradictory medical evidence in her
 11 credibility assessment, noting plaintiff's "generally intact physical functioning[,"] and
 12 deeming "findings of a normal gait, full lumbar range of motion, negative straight leg raises,
 13 and full lower extremity strength . . . inconsistent with her alleged limitations." (AR 17-18.)
 14 "Contradiction with the medical record is a sufficient basis for rejecting the claimant's
 15 subjective testimony." *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008).

16 Plaintiff, in challenging the ALJ's decision, offers her own interpretation of the record
 17 as supporting her allegations. However, the ALJ is responsible for resolving conflicts in the
 18 medical record, *id.* at 1164, and when evidence reasonably supports either confirming or
 19 reversing the ALJ's decision, we may not substitute our judgment for that of the ALJ, *Tackett*
 20 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). *See also Sample v. Schweiker*, 694 F.2d 639,
 21 642 (9th Cir. 1982) (noting "questions of credibility and resolution of conflicts in the testimony
 22 are functions solely of the Secretary.") (internal quotation marks and citation omitted). In this

01 case, plaintiff fails to demonstrate that the ALJ's interpretation of the record was not rational.

02 Plaintiff also attempts to cast the ALJ's decision as containing an inappropriate reliance
 03 on a failure to pursue treatment without consideration of her lack of insurance. *Compare*
 04 *Molina*, 674 F.3d at 1113-14 (“We have long held that, in assessing a claimant’s credibility, the
 05 ALJ may properly rely on unexplained or inadequately explained failure to seek treatment or to
 06 follow a prescribed course of treatment.”) (quoted sources and internal quotation marks
 07 omitted), *with* SSR 82-59 (failure to follow prescribed treatment may be justifiable where
 08 claimant unable to afford) and SSR 96-7p (ALJ should not draw inferences from failure to seek
 09 or pursue treatment without first considering explanations for that failure, including an inability
 10 to afford treatment). This argument fails.³

11 The Court first observes that the evidence as to plaintiff’s inability to afford treatment is
 12 not entirely clear. Plaintiff testified at the February 2012 hearing that she “[n]o longer” has
 13 health insurance, which has interfered with her ability to go to the doctor. (AR 51.) While
 14 this may be true, the record also reflects that plaintiff did, for some relevant period of time, have
 15 health insurance. (*See, e.g.*, AR 278-81 (reflecting “Regence” payments in 2007 and 2008,
 16 and noting, in December 2007, a “new insurance plan.”) and AR 371 (January 18, 2008 letter
 17 from Regence insurance inquiring into services provided for plaintiff).) Other documents

18 3 Plaintiff also cites *Warre*, 439 F.3d at 1003, for the proposition that the failure to follow
 19 prescribed treatment only supports a finding of non-disability if the treatment in question would
 20 effectively control the impairments. She maintains the evidence does not establish that taking more
 21 medication or undergoing surgery would have accomplished that goal. However, *Warre* does not stand
 22 for the proposition asserted by plaintiff. Instead, in that case, the Ninth Circuit noted that
 “[i]mpairments that can be controlled effectively with medication are not disabling for the purpose of
 determining eligibility for SSI benefits” and acknowledged that “benefits may not be denied to a
 disabled claimant because of a failure to obtain treatment that the claimant cannot afford[,]” but rejected
 the contention “that disability benefits may not be discontinued if the claimant cannot afford treatment
 without them.” *Id.* at 1006.

01 reflect that plaintiff's treatment was being covered through car insurance as a result of the
 02 accident. (*See, e.g.*, AR 291 (June 2006: "Statefarm – accepting liability.")) Given this
 03 evidence, it is not at all clear the ALJ could be said to have improperly relied on an unexplained
 04 or inadequately explained failure to seek or follow treatment.

05 In any event, plaintiff misconstrues the ALJ's reasoning. In addition to the
 06 contradictory medical evidence, the ALJ construed the record as reflecting "minimal" and
 07 "intermittent" treatment, and improvement through that treatment. (AR 17-18.) "Evidence
 08 of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of
 09 an impairment." *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (quoting *Johnson v.*
 10 *Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)); *accord Tommasetti*, 533 F.3d at 1039-40 ("The
 11 record reflects that Tommasetti responded favorably to conservative treatment including
 12 physical therapy and the use of anti-inflammatory medication, a transcutaneous electrical nerve
 13 stimulation unit, and a lumbosacral corset. Such a response to conservative treatment
 14 undermines Tommasetti's reports regarding the disabling nature of his pain."); *Meanel v. Apfel*,
 15 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints where petitioner's
 16 "claim that she experienced pain approaching the highest level imaginable was inconsistent
 17 with the 'minimal, conservative treatment' that she received"). Plaintiff fails to demonstrate
 18 any error in the ALJ's consideration of this evidence.

19 For the reasons stated above, the ALJ properly relied on contradictory medical evidence
 20 and evidence of improvement through minimal and intermittent treatment in assessing
 21 plaintiff's credibility. The ALJ, therefore, provided additional clear and convincing reasons
 22 for her credibility assessment and that assessment should be upheld.

01 CONCLUSION

02 For the reasons set forth above, this matter should be AFFIRMED.

03 DATED this 20th day of December, 2013.

04
05 

06 Mary Alice Theiler
07 Chief United States Magistrate Judge